

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 15173/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED. YES

BRIAN CAMERON BELL RAE

Applicant

and

THE SHERIFF OF THE HIGH COURT
KEMPTON PARK SOUTH

First Respondent

ABSA BANK LIMITED

Second Respondent

DANIEL NKUNA

Third Respondent

F H TSHILONGWANE

Fourth Respondent

K J THOLO

Fifth Respondent

THE REGISTRAR OF DEEDS, PRETORIA

Sixth Respondent

JUDGMENT

GRAVES AJ

1. This case illustrates the confusion that can occur when an execution creditor does not manage the execution process sufficiently carefully, particularly from the perspective of interactions with the execution debtor. It also shows how assumptions by an execution debtor as to the existence of a state of affairs, which are of doubtful provenance, cause expectations which are not realistic.
2. The applicant applies in accordance with uniform rule 53 to review and set aside a decision by the first respondent ("the sheriff") to condone the failure to enforce conditions of sale in a judicial sale in execution, and setting aside of the sale to the third respondent ("Mr Nkuna"). The application was opposed by Mr Nkuna, who delivered a counter application for certain relief, dealt with below. The second respondent ("ABSA") also opposed the application and delivered an answering affidavit. There was no opposition from the fourth and fifth respondents. The background to this application appears from what follows.

3. The applicant is the registered owner of an immovable property described as Erf 2280, Terenure, Extension 64, Kempton Park ("the property"). Pursuant to a judgment obtained by ABSA in this court on 16 November 2010 under case number 34427/2010 (which included an order that the property be declared executable), the sheriff gave notice in accordance with Uniform Rule 46 that the property would be sold by public auction on 10 November 2011. The applicant does not challenge the validity of this judgment and order. Conditions of sale were duly prepared pursuant to Rule 46(8)(a), the auction was held on 10 November 2012 and the property was knocked down to Mr Nkuna for a sum of R130 000,00. I will revert to this sale shortly.
4. In his founding papers the applicant sketches a sequence of events relied upon for the relief sought:
 - 4.1 on 1 October 2011 he met with a representative of ABSA, Mr Wayne Harries. At this meeting there was a discussion about how the applicant could utilize ABSA's "Help U Stay" option which would permit him to resume payments in terms of the mortgage bond, and be permitted to seek a purchaser for the property. A copy of the Memorandum of Agreement (incorporating the Help U Stay option) was attached to the founding papers.

- 4.2 What this document shows (and this is conceded by the applicant) is that although he signed on 1 October 2011, the signature by Mr Harris was merely as a witness to the applicant's own signature, and was not affixed in the position where provision is made for ABSA to sign, nor with the intention of binding ABSA. In view of this difficulty Mr McDonald who appeared for the applicant, suggested that an oral agreement had been reached on the terms set out in the Memorandum of Agreement signed by the applicant on 1 October 2011. The conclusion of an agreement is denied by ABSA, and I am unable to find on these papers that an agreement on the terms of the written Memorandum of Agreement was concluded. If I am wrong then the existence of the agreement does not assist the applicant, as will become apparent.
- 4.3 Pursuant to the applicant's belief that he had a binding agreement with ABSA he proceeded to sell the property to the fourth and fifth respondents (Mr Tshilongwane and Ms Tholo respectively) for the sum of R380 000,00 in terms of a written agreement of sale apparently signed by the purchasers and by the applicant (said by the applicant to have been concluded on 5 December 2011, but bearing no date). I have serious doubts as to the validity of the agreement, but I need make no finding in this regard.

4.4 The applicant does not say whether he was aware of the prior sale by the Sheriff to Mr Nkuna, but I believe this to be the case; nothing turns on this. As this is a review the Sheriff delivered a record of the proceedings (included the papers before me) and the applicant has utilized certain of these documents in support of this application. The applicant says that he proceeded on the understanding that an agreement had been reached with ABSA to permit him to sell the property, and following the sale on 5 December 2011 he instructed an attorney, Ms van Coller, to attend to the transfer of the property to Mr Tshilongwane and Ms Tholo. He says the following which is not seriously disputed by ABSA:-

4.4.1 On 10 February 2012 the Standard Bank of South Africa Limited issued a guarantee to ABSA advising that they held the sum of R319 800,00 on behalf of Mr Tshilongwane and Ms Tholo, payable on cancellation of the existing mortgage bond over the property, transfer of the property to Mr Tshilongwane and Ms Tholo and the registration of a mortgage bond in favour of these last mentioned parties for the sum of R1 147 600,00. Pertinently, the applicant says that the guarantee was accepted by ABSA and that the sum of R319 800,00

was sufficient for all monies owed to ABSA. On 22 February 2012 he paid the sum of R1 710,00 to Attorneys Hammond Pole (attorneys for ABSA) for the uplifting of the attachment against the property.

4.4.2 On 7 March 2012 ABSA's attorneys wrote to the applicant's conveyancer advising that ABSA had given instruction to uplift the attachment over the property and that the Sheriff had been instructed accordingly. On the same day ABSA wrote to the applicant confirming a discussion on that day advising that the purchaser (a reference to Mr Nkuna) did not perform and that ABSA was proceeding to cancel the sale via the High Court, which process could take three months. The letter went on to say that ABSA was prepared to review the applicant's private offer on the property (what this means is not explained).

4.4.3 Some days later the tone of correspondence changed, with ABSA writing to the applicant's wife to say that investigations were underway. Ultimately, on 5 April 2012, ABSA's attorneys wrote to the applicant's conveyancers confirming that a sale in execution of the property had been held, and that although cancellation

proceedings had been commenced, the purchaser had in fact complied with his obligations. The applicant was advised that the transfer was accordingly proceeding.

5. The applicant was understandably dismayed at this *volte-face* and moved the North Gauteng High Court as a matter of urgency to suspend the process of registration of transfer of the property to Mr Nkuna. These application papers took substantially the same form as those serving before me, and on 13 April 2012 Louw J granted a temporary interdict restraining the transfer pending the outcome of an application in the Gauteng Local Division declaring the sale to Mr. Nkuna to be invalid , and reserving the costs.
6. The conditions of sale for the sale in execution of the property on 10 November 2011 provide in material part as follows:-

“5. **CONDITIONS OF PAYMENT**

5.1(a) *The Purchaser shall pay a deposit of ten percent of the purchase price in cash immediately upon signature of these conditions by the Sheriff, the balance against transfer to be secured by a bank or building society guarantee, to be approved by the Execution Creditor's Attorneys, to be furnished to the*

Sheriff within 21 (twenty-one) days after the date of sale....

(b) *If transfer of the property is not registered within 1 (one) month after date of sale, the Purchaser will be liable to pay interest on the balance of the purchase price at the rate currently levied by the Judgment Creditor on the mortgage loans calculated from 1 (one) month after the date of sale to date of registration of transfer ...".*

5.6 *If the Purchaser fails to pay the deposit on the day of the sale, the sale shall be null and void and the Sheriff shall immediately put the property up for auction again."* (Emphasis added)

7. It is common cause that payment of the deposit was made by Mr Nkuna to the Sheriff on the day of the auction in the sum of R19 042,00, and that the balance of the purchase price was paid by deposit into ABSA's attorney's trust account in the sum of R127 368,79 on 22 December 2011. The applicant says that this was outside of the twenty-one day period referred to in condition 5.1(a) referred to above. As the Sheriff is required to follow the rules of court "*meticulously with regard to the execution process*", the applicant says that the Sheriff has behaved in an irregular

fashion and that he has suffered prejudice. During argument it was made clear that the applicant relied upon Rule 46(11) of the Uniform Rule which reads in material part as follows:-

“11. If the purchaser fails to carry out any of his obligations under the conditions of sale the sale may be cancelled by a Judge summarily on the report of the sheriff after due notice to the purchaser, and the property may again be put up for sale, and the purchaser shall be responsible for any loss sustained by reason of his default ...”¹ (Emphasis added)

8. There was some debate in argument as to whether the reference to twenty-one days in clause 5.1(a) of the conditions of sale referred to court days (as defined in Rule 1) or whether this was merely calendar days. Clause 1.1 of the conditions of sale says in express terms that the sale is conducted in accordance with the provisions of Rule 46 of the Uniform Rules; this would tend to suggest that the twenty-one days is a reference to court days. However, I will assume in favour of the applicant that the reference is to calendar days.

¹ Clause 10.1 of the **Conditions of Sale** is for all intents and purposes, identical.

9. The applicant's complaint and the basis for his review may be summarized as follows:-

9.1 He remains the registered owner of the property until it is transferred to another person.

9.2 Although a judgment has been granted against him together with an order declaring the property executable (which judgment he does not in any way assail) he points to the judgment of this court in **Sheriff of the High Court, Johannesburg South v Sithole & Three similar cases**² where Spilg J found (correctly in my respectful view) that whilst the execution debtor has no direct say in how the sale in execution is to take place, and plays a passive role in this process, he or she has a clear interest to minimize any further debt.³

9.3 The Sheriff was not entitled to grant Mr Nkuna an indulgence or extension of time for the purposes of paying or securing the balance of the purchase price. This the applicant says was an irregularity in the process which prejudiced him, and which entitles him to review and set aside the decision of the Sheriff to condone

² 2013 (3) SA 168 (GSJ)

the failure of Mr Nkuna to comply with the conditions of sale, and to set aside this sale.

10. During argument Mr McDonald on behalf of the applicant said that the review was one at common law, although he could not identify a specific principle that was applicable. ABSA contend that any review had to be in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), but that the conduct of the Sheriff did not constitute administrative action as defined in Section 1 of this Act.
11. Cora Hoexter : Administrative Law in South Africa (2nd Edition) deals with what was historically regarded as common law review⁴ and identifies this as the inherent power of the Supreme Court (now High Court) to scrutinize and set aside administrative decisions or rules on the basis of particular grounds of review.⁵ Prior to the constitutional era the inherent justification for interfering in administrative decisions was the *ultra vires* doctrine.⁶ The Constitutional Court has authoritatively pronounced that there is now only one system of law governing review, being a system shaped and

³ At paragraph 7.

⁴ Forming part of three separate types of review as identified by Innes CJ in **Johannesburg Consolidated Investment Co. v Johannesburg Town Council** 1903 TS 111 at 116

⁵ At pages 112-113.

⁶ *Id*, page 115.

governed by the Constitution.⁷ Although common law review is not excluded, it now has a greatly reduced role essentially confined to the realm of private power.⁸ PAJA is now the primary or default pathway to review.⁹ Although it makes little or no difference to the outcome of this application which basis of review is followed, I believe that PAJA is applicable.

12. The applicant has a number of obstacles in his path in succeeding in his review:-

12.1 The prejudice which he claims to have suffered as a result of the Sheriff's failure to insist on proper compliance with the conditions of sale is that this potentially precludes him from achieving a better price for the property in accordance with the sale agreement concluded with Mr Tshilongwane and Ms Tholo. For this he relies upon the Help U Save provision in the Memorandum of Agreement which he signed on 1 October 2011. But even if I could find that an agreement had been concluded (which I am unable to do) the very terms of this agreement are destructive of

⁷ **Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa** 2000 (2) SA 674 (CC) at paragraph 44.

⁸ *Id*, page 117.

⁹ *Id*, page 118.

his contention of prejudice. The agreement provides that the applicant is required to continue paying a specified amount towards his monthly mortgage loan repayment (which there is no evidence that he did) and that he grants ABSA a power of attorney to sell the property if he has not fully complied with the provisions of that agreement. In other words, no expectation, express or implied, is created in this document that the applicant is himself entitled to market and sell the property.

- 12.2 Insofar as a delay in the payment of the balance of the purchase price may have occurred which in turn could lead to the delay in transfer of the property, then clause 5.1(b) of the conditions of sale adequately protects the applicant by making the purchaser liable for interest at the rate applicable in the mortgage bond, thereby effectively freezing and securing the judgment debtor's financial position to prevent prejudice to him.
- 12.3 Neither Rule 46(11) nor clause 10.1 of the conditions of sale obliges the Sheriff to cancel the sale in the event of non-compliance with any conditions; both the Rule and the condition are expressed permissively, and I can find no injunction requiring the Sheriff to cancel. In **Standard Bank of South Africa v**

Ndlovu¹⁰ Sutherland J dealt with an election by the Sheriff to effect a cancellation in terms of an identical clause 5.1 as follows:-

*"A purchaser only has those rights that are to be found within the four corners of the sale agreement. If the guarantees are late, even though the purchaser may be blameless, there is no juridical basis on which to challenge the right of election vested in the sheriff in clause 5.1 of the sale agreement to effect a cancellation. In an ordinary contract a provision vesting a right to cancel upon the happening or no-happening of a specified event by a stipulated date is not susceptible to challenge. The election is not a breach of contract. The mantle of judicial supervision over a sale in execution and its cancellation does not create more or better rights for the defaulting purchaser."*¹¹ (Emphasis added)

In my view the converse also applies; if the Sheriff has a right to condone non-compliance with conditions of sale, which I am satisfied he has, then his discretion is not open to challenge.

¹⁰ 2012 JDR 0525

¹¹ At paragraph 15.

Much less so by an execution debtor such as the applicant, who on the authority of **Sithole** (*supra*), has only a passive role in the execution process.

12.4 The definition of “*administrative action*” in Section 1 of PAJA is:-

- “... *any decision taken, or any failure to make a decision, by*
- (a) ... *a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external, legal effect ...*”

12.5 As the Sheriff was within his rights to condone the failure of Mr Nkuna to secure the balance of the purchase price within the twenty-one day period referred to in Condition 5.1(a) this cannot be regarded as adversely affecting the rights of the applicant; the does not have the rights which he seeks to invoke. Further, the applicant does not bring himself within the purview of Section 6 of PAJA which defines the grounds for judicial review of administrative action. The same result would follow if the applicant is required to show that the sheriff acted *ultra vires* his powers. The applicant has failed to make out a case for review.

13. The applicant's assumption as to his right to sell the property, notwithstanding the judgment granted against him and the order declaring the property executable, was unjustified and wrong. However, the conduct of ABSA and its attorneys was inexplicable in certain respects. Despite my finding that the applicant was not entitled to proceed independently to sell the property, it seems *prima facie* that if a sale was indeed concluded with Mr Tshilongwane and Ms Tholo, this was on considerably better terms for the applicant than the sale concluded in execution with Mr Nkuna. Although this in and of itself does not grant the applicant a basis for review, it seems possible that ABSA's equivocal conduct caused him to continue with his sale, based upon the representations by ABSA through its attorneys to the effect that the sale with Mr Nkuna was in the process of being cancelled. ABSA's answering affidavit is seriously deficient in dealing with this aspect. No proper explanation for this equivocal conduct is provided apart from a formulaic assertion – correct, but unhelpful – that ABSA was entitled to proceed to sell the property in execution.
14. An e-mail from ABSA's attorneys to the applicant's former attorney on 26 March 2012 is revealing. This e-mail was for some reason not attached to ABSA's answering affidavit, but formed part of the application for urgent relief before Louw AJ. The following are relevant excerpts:-

"1. The property was sold at a Sale in Execution on 10 November 2011 to a third party purchaser. Prior to that there was no undertaking from our client that the sale would be cancelled as a result of the "Help-u-Stay" initiative.

2. ...

3. The fact that our offices received cancellation instructions is due to an administrative error and does not have the effect of cancelling the Sale in Execution which sale can only be cancelled by a High Court Judge on suitable application to the High Court Rules;

4. The problem was exsacerbated (sic) further when you requested our offices to uplift the attachment and the staff members dealing with the matter failed to notice that the property had in fact already been sold and as such no further transfer could proceed nor could the attachment be uplifted. This was lax on the part of our staff and we apologise for the inconvenience and irritation caused as a result.

5. As such the situation is as follows:-

- ...*
- the purchaser has complied with his obligations to thereof and as such we have no choice but to pass transfer once the clearance certificate is received;*
- your transfer cannot proceed;*

- *the only way that we can stop the transfer is if we receive a High Court order compelling us to do so."*

15. Paragraph 1 of the above letter is correct but the cancellation instruction referred to in paragraph 3 contradicts this, as does the acceptance by ABSA of the Standard Bank guarantee referred to above. The administrative error referred to in paragraph 3 and the further error referred to in paragraph 4 caused some expectation on the part of the applicant. The indication in the final bullet point of paragraph 5 compelled the applicant to move the North Gauteng High Court urgently to protect his rights as he saw them at that time, bearing in the mind that he had not at that stage received the record in terms of Rule 53, nor answering papers. It does not appear whether there was any opposition before Louw J but I suspect not.
16. Ineluctably, ABSA was required to explain why it had approbated and reprobated, and its failure to do so must be taken into account.
17. Mr. Nkuna did not appear at the hearing before me despite having received a notice of set down from the applicant. Because I cannot uphold the applicant's review it is unnecessary to make any declaration as sought in the notice of counter-application, or for costs as prayed for therein. The Sheriff did not oppose the application but merely delivered a

confirmatory affidavit to the answering affidavit of ABSA. Effectively it was only ABSA who ultimately opposed the relief sought.

18. There is a degree of opportunism on the part of the applicant. He seeks to interfere in the execution process without any right to do so and his interpretation of Rule 46(11) is flawed. But ABSA's conduct created an expectation on his part which, notwithstanding the doubtful legal validity of his review, cannot be regarded as entirely unreasonable. The Sheriff was not obliged to cancel the sale to Mr Nkuna, nor was ABSA required to insist on this. But the applicant should not have been told by ABSA's attorney that the sale was being cancelled and the attachment was being uplifted. There is no reason to regard this as anything other than a genuine mistake, but it did have the consequence of causing the applicant to seek urgent interdictory relief.
19. I believe that the applicant had sufficient grounds for seeking urgent interdictory relief, notwithstanding that his legal basis for challenging the sale in execution has ultimately been found to be insufficient to sustain a review. He is arguably entitled to his costs of the urgent proceedings, and ABSA would in the normal course be entitled to its costs in this application. But as I do not know whether there was any active opposition during the urgent proceedings, I believe it is preferable simply to order the applicant and ABSA to bear their own costs in these proceedings.

20. It does occur to me that the interim order granted by Louw J on 13 April 2012 should be discharged. The terms of that order contemplate that the interim relief will only endure until the final relief is determined, and the Gauteng Provincial Division and the Gauteng Local Division are courts of equal competence for this matter.
21. I accordingly make the following order:-
- 21.1 The applicant's review application is dismissed.
- 21.2 The interim order granted by Louw J in the Gauteng Provincial Division on 13 April 2013 is discharged.
- 21.3 The third respondent's counter-application is dismissed.
- 21.4 Each party is to bear its own costs occasioned in this application and in the Gauteng Provincial Division.

**N J GRAVES
ACTING JUDGE OF
THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**DATE OF HEARING: 29 July 2014
DATE OF JUDGMENT: 05 August 2014**

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